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Leisure Dotcom Sdn Bhd v Globesource Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1606–07 OF 2012
ZAHARAH IBRAHIM, ALIZATUL KHAIR AND VARGHESE GEORGE JJCA
17 AUGUST 2015

C

Contract — Agreement — Sale and purchase — Appeal from High Court — Non-compliance of terms of sale and purchase agreement — Whether trial judge considered terms of sale and purchase agreement in its entirety — Whether there was lack of judicial appreciation

D

The respondent ('the vendor') had agreed to transfer to the appellant ('the purchaser') a piece of land ('the property'). RM7,216,200 had been paid by the purchaser to the vendor. One of the conditions stipulated in the sale and purchase agreement was that there be obtained a consent from the Datuk Bandar Kuala Lumpur in respect of the novation/assignment of the leases to the E purchaser. The SPA became unconditional when the purchaser exercised its discretion under the SPA and waived the vendor's obligations in so far as the fulfilment of the conditions precedent related to the leases was concerned. The purchaser informed the vendor that the purchaser would as per the terms of F SPA, pay the balance of the purchase price to the vendor. The issue that arose for determination in the High Court was whether the purchaser had duly complied with the terms of the SPA and completed the sale and purchase as contracted for. The vendor contended that the purchaser had breached the SPA by failing to pay the balance of the purchase price and had proceeded to issue G a notice of termination pursuant to cl 12.1 of the SPA determining the contract. The High Court held that the purchaser had unilaterally attempted to impose an undertaking which was not agreed to by the vendor; this amounted to an unauthorised variation of or an additional term to the SPA. The issues that arose for determination in the present appeal were that there was lack of H adequate judicial appreciation or evaluation of the evidence by the trial judge, in particular, it was argued, that the oral evidence of the vendor's witnesses was not sufficiently tested against the contents of available contemporaneous documents; the court ought to have in any case made a finding as to credibility of those witnesses (which it did not) as their oral testimony contradicted the I contents of those documents; and the trial judge had failed to consider the terms of the SPA in its entirety, specifically that, pursuant to cl 4.2 of the SPA, the purchaser was entitled in any event to an automatic extension of three months (in addition to the completion period) to complete the sale and purchase by payment of the balance of purchase price.

Held, allowing the appeal:

(1) The purchaser's solicitors had made it clear that the purchaser was ready and willing to complete the sale and purchase agreement and had taken all steps towards that end. It was the vendor who was taking the position that the sale and purchase could not be completed and had even gone on to put a rider or to pre-empt any payment of the balance purchase price, even if effected, to be not in completion of the sale and purchase by the purchaser (see para 23).

(2) The trial judge took a rather simplistic approach and was in error in just accepting the oral testimony of the vendor's witnesses without critically testing it against the contents of contemporaneous and relevant documents. The sequence of correspondence/emails passing between the solicitors for the respective parties on this critical day and their contents, if analysed and appreciated properly, paint a different and contrary picture to the findings reached by the trial judge. There was no analysis by the trial judge of the purport or effect of the vendor's solicitors handwritten note on the purchaser's solicitors' letter. The authenticity of this note was never in dispute (see para 29).

(3) The undertaking imposed in the purchaser's solicitors' letter was expressly agreed to by the vendor's solicitors when there was no qualification expressed in the handwritten note and when the cash orders tendered were not rejected outright. The only reservation expressed by the vendor's solicitors was that 'late interest' would be chargeable if the SA and PA were not signed by 25 August 2008. It must be reiterated that the vendor's solicitors had voluntarily taken upon themselves the responsibility of finalising the SA and PA. There was a written variation to the SPA mutually agreed to by the parties. The trial judge was clearly wrong in concluding that there was a 'unilateral' imposition by the purchaser of 'new terms and conditions' to the SPA (see paras 30–31).

(4) The submission of the vendor that the purchaser was disentitled to an extension was wholly devoid of any merit. The vendor's solicitors own written assertion and confirmation confirmed that ' ... that the SPA is completed ... '. The purchaser's reliance on this 'automatic extension' entitlement was to point out that, putting aside the controversy surrounding the question whether the payment of the balance of purchase price have been effectively made or not, the purchaser had still time to make payment in any event, which had been preempted by the wrongful notice of termination of SPA issued by the vendor's solicitors (see para 47).

(5) This was a case where appellate intervention was warranted in all the circumstances of the matter as discussed and elaborated above, to prevent an injustice being occasioned to the purchaser. The trial judge's crucial

so-called finding that the purchaser was not willing and able to complete the sale and purchase and/or had evinced an intention not be further bound to the terms of the SPA was wholly perverse when evidence all pointed otherwise. It was clearly evident that the trial judge's focus of enquiry was wholly misplaced and the acceptance of the oral testimony of the vendor's witnesses without critically testing it against available contemporaneous documents, had in this case resulted in a failure of proper judicial appreciation of the totality of evidence, both oral and documentary, led before the court (see para 48).

[Bahasa Malaysia summary

Responden ('penjual') telah bersetuju untuk memindah milik sebidang tanah kepada perayu ('pembeli'). RM7,216,200 telah dibayar oleh pembeli kepada penjual. Salah satu syarat yang dinyatakan dalam perjanjian jual beli ('PJB') adalah bahawa persetujuan mesti diperoleh daripada Datuk Bandar Kuala Lumpur bagi novasi/penyerahakkan pajakan kepada pembeli. PJB menjadi tidak bersyarat apabila pembeli menjalankan budi bicaranya di bawah PJB dan mengenepikan tanggungjawab penjual setakat mana pemenuhan syarat-syarat terdahulu berkaitan pajakan berkenaan. Pembeli memaklumkan kepada penjual bahawa pembeli akan, seperti yang termaktub dalam PJB, membayar baki harga belian kepada penjual. Isu yang timbul bagi pemutusan dalam Mahkamah Tinggi adalah sama ada pembeli telah mematuhi terma PJB dan memenuhi jual beli seperti yang dikontrakkan. Penjual menghujahkan bahawa pembeli telah melanggar PJB dengan gagal untuk membayar baki harga belian dan seterusnya mengeluarkan notis penamatan di bawah klausa 12.1 PJB yang mengesahkan kontrak. Mahkamah Tinggi memutuskan bahawa pembeli telah secara *unilateral* cuba untuk menguatkuasakan akujanji yang tidak dipersetujui oleh pembeli; ini terjumlah kepada variasi yang tidak disahkan atau terma tambahan bagi PJB. Isu-isu yang timbul bagi pemutusan dalam rayuan ini adalah kurang pertimbangan atau penilaian kehakiman keterangan oleh hakim bicara, khususnya, dihujahkan, bahawa keterangan lisan saksi-saksi penjual tidak diuji secukupnya terhadap kandungan dokumen-dokumen semasa yang sedia ada; mahkamah sepatutnya, dalam apa jua keadaan, memutuskan berdasarkan kredibiliti saksi-saksi (yang mana tidak dilakukan) kerana keterangan lisan mereka bercanggah dengan kandungan dokumen-dokumen tersebut; dan hakim bicara gagal mempertimbangkan keseluruhan terma-terma PJB, khususnya, di bawah klausa 4.2 PJB, pembeli berhak, dalam apa jua keadaan, terhadap lanjutan automatik tiga bulan (tambahan kepada tempoh penyempurnaan) untuk menyempurnakan jual beli dengan bayaran baki harga belian.

Diputuskan, membenarkan rayuan:

(1) Peguam cara pembeli telah menyatakan dengan jelas bahawa pembeli telah bersedia dan sanggup untuk menyempurnakan perjanjian jual beli

dan telah mengambil semua langkah-langkah ke arah itu. Penjual yang telah mengambil kedudukan bahawa jual beli tidak dapat disempurnakan dan malah meletakkan lampiran atau menghalang apa-apa bayaran baki harga belian, jika pun dilaksanakan, sebagai penjualan dan pembelian tidak sempurna oleh pembeli (lihat perenggan 23).

(2) Hakim bicara mengambil pendekatan yang agak mudah dan terkhilaf dengan hanya menerima keterangan lisan saksi penjual tanpa mengujinya terhadap kandungan dokumen semasa dan relevan secara kritikal. Turutan surat-menyurat/emel antara peguam cara pihak-pihak berkenaan pada hari kritikal ini dan kandungan mereka, jika dianalisis dan dipertimbangkan dengan betul, memberi gambaran yang berbeza dan bertentangan dengan dapatan hakim bicara. Tiada analisis oleh hakim bicara mengenai inti pati atau kesan nota tulisan tangan peguam cara penjual pada surat peguam cara pembeli. Kesahihan nota ini tidak pernah dipertikaikan (lihat perenggan 29).

(3) Akujanji dalam surat peguam cara pembeli telah dipersetujui secara jelas oleh peguamcara penjual apabila tidak ada kelayakan yang dinyatakan dalam nota tulisan tangan dan apabila kiriman tunai yang dikemukakan tidak ditolak terus. Satu-satunya dilihat dinyatakan oleh peguam cara penjual ialah bahawa faedah lewat akan dikenakan jika SA dan PA tidak ditandatangani pada 25 Ogos 2008. Ia mesti ditekankan bahawa peguam cara penjual telah secara sukarela memikul tanggungjawab untuk memuktamadkan SA dan PA. Terdapat variasi bertulis kepada PJB yang dipersetujui bersama oleh pihak-pihak. Hakim bicara jelas salah dalam memutuskan bahawa terdapat satu penguatkuasaan 'unilateral' oleh pembeli 'terma dan syarat baru' terhadap PJB (lihat perenggan 30–31).

(4) Hujahan penjual bahawa pembeli tidak layak terhadap lanjutan secara keseluruhannya tidak bermerit. Kenyataan bertulis dan pengesahan peguam cara penjual sendiri mengesahkan bahawa ' ... bahawa SPA telah selesai ... '. Pergantungan pembeli pada kelayakan 'lanjutan automatik' adalah untuk menunjukkan bahawa, mengenepikan kontroversi persoalan sama ada bayaran baki harga belian telah dibuat secara efektif atau tidak, pembeli masih mempunyai masa untuk membuat bayaran dalam apa jua keadaan , yang terhalang akibat notis penamatan salah PJB yang dikeluarkan oleh peguam cara penjual (lihat perenggan 47).

(5) Ini adalah kes di mana campur tangan rayuan adalah wajar dalam segala hal keadaan perkara seperti yang telah dibincangkan dan dihuraikan, untuk mengelakkan ketidakadilan terhadap pembeli. Dapatan hakim bicara yang penting iaitu dapatan bahawa pembeli tidak bersedia dan mampu untuk menyempurnakan jual beli dan/atau membuktikan niat tidak lagi terikat kepada syarat-syarat PJB adalah keseluruhannya tersimpang apabila kesemua keterangan menunjukkan sebaliknya. Jelas

terbukti bahawa tumpuan hakim bicara terhadap siasatan secara keseluruhannya tidak kena pada tempatnya dan penerimaan keterangan lisan saksi penjual tanpa ujian kritikal terhadap dokumen semasa, telah menyebabkan kegagalan pertimbangan wajar keseluruhan bukti, kedua-dua keterangan lisan dan dokumentar yang dikemukakan di mahkamah (lihat perenggan 48).]

Notes

For cases on sale and purchase, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3323–3327.

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yaakob & Ors [2000] 4 MLJ 433, CA (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229; [1979] 1 LNS 119, FC (refd)

Appeal from: Civil Suit No S1–22–946 of 2008 (High Court, Johor Bahru)

Cecil Abraham (Sunil Abraham and Alex Tan with him) (Wong Kian Kheong) for the appellant.

Yee Mei Ken (K Kavitha and Teh Soon Jin with her) (Shearn Delamore & Co) for the respondent.

Varghese George JCA:

INTRODUCTION

[1] The High Court had on 6 July 2012 after a full trial dismissed the appellant's suit for an order for specific performance to be granted in respect of a sale and purchase agreement dated 21 June 2007 ('the SPA') which had been entered into by the parties. The court went on to allow the respondent's counterclaim brought in the suit for the deposit to be forfeited, the caveat lodged by the appellant to be removed and the damages occasioned in the interim by the presence of the caveat to be assessed.

[2] This appeal was against the whole of that decision. On 25 June 2014 we allowed the appeal and set aside the orders made by the learned trial judge in respect of both the claim and the counterclaim. We ordered that there be specific performance of the SPA and directed that the appellant effect payment of the balance of the purchase price within 30 days of our order, and the respondent thereafter to complete the sale and purchase.

[3] In this grounds, to best capture the relationship between the parties and the context of related developments, the appellant will be referred to as 'the purchaser' and the respondent as 'the vendor'. The parties were represented by separate solicitors at various stages of the transactions and they will be referred to in this grounds as the relevant party's solicitors, and unless stated otherwise they were the respective conveyancing solicitors.

[4] Subject to the terms and conditions of the SPA the vendor had agreed to transfer to the purchaser a piece of land (Lot 1216) (with the building erected thereon including assets therein) and also the interest of the vendor held under two leases of adjoining lands, namely Parcel A (Lot 164) and Parcel B (Lot 1265) (all three lots collectively referred to as 'the property'). The agreed consideration for the sale and purchase was RM72.162m and upon execution of the SPA, a deposit in the sum of RM7,216,200 had been paid by the purchaser to the vendor.

[5] The further compliance or performance of the mutual obligations of the parties under the terms contained in the SPA were however subject to certain conditions precedent being satisfied (cl 8.1 of the SPA). One of the conditions stipulated was that there be obtained a consent from the Datuk Bandar Kuala Lumpur in respect of the novation/assignment of the leases of Parcel A and Parcel B to the purchaser.

[6] On 21 May 2008 the SPA became unconditional when the purchaser exercised its discretion under the SPA and waived the vendor's obligations in so far as the fulfilment of the conditions precedent related to the leases was concerned.

On 22 May 2008 the purchaser's solicitors informed the vendor's solicitors that the purchaser would as per the terms of SPA, pay the balance of the purchase price to the vendor's solicitors on or before 20 August 2008.

[7] Clause 4.2 of the SPA which was pertinent as to the completion of the sale and purchase of the property was in the following terms:

> The balance of the Purchase Price amounting to Ringgit Malaysia Sixty Four Million Nine Hundred Forty Five Thousand and Eight Hundred Only (RM64,945,800.00), equivalent to approximately ninety per centum (90%) of the Purchase Price (the 'Balance Purchase Price') shall be paid by the Purchaser to the Vendor's Solicitors within three (3) months from the Unconditional Date (hereinafter defined in Clause 8.2(j) (the 'Completion Period'. In the event the Balance Purchase Price is not paid or cause to be paid by the Purchaser by the expiry of the Completion Period, the Purchaser is entitled to an automatic extension of three (3) months from the expiry of the Completion Period or such other extended period as may be mutually agreed by parties in writing (the 'Extended Completion Period') to allow the Purchaser to pay the same subject to the Purchaser paying to

A the Vendor interest on the Balance Purchase Price or any part outstanding thereof calculated at the rate of eight per centum (8%) per annum calculated on a daily basis from the expiry of the Completion Period until the date of actual payment of Balance Purchase Price (the 'Late Interest'). The Late Interest, if any, shall be paid simultaneous with the payment of the Balance Purchase Price.

B

[8] The controversy between the parties which formed the subject matter of this litigation revolved essentially around the question whether the purchaser had duly complied with the terms of the SPA and completed the sale and purchase as contracted for. The vendor contended that the purchaser had C breached the SPA by failing to pay the balance of the purchase price and had proceeded on 13 October 2008 to issue a notice of termination pursuant to cl 12.1 of the SPA determining the contract.

[9] The purchaser had commenced this suit on 6 October 2008 and what D was central to the rival contentions of the parties were the events (including correspondence) that unfolded between 22 May 2008 and the termination by the vendor of the SPA on 13 October 2008, which was challenged by the purchaser as being unlawful and of no effect.

E FINDINGS OF THE HIGH COURT

[10] The conclusions arrived at by the learned trial judge could in essence be summarised as follows:

F (a) the purchaser had unilaterally attempted to impose an undertaking vide their solicitor's letter of 20 August 2008 which was not agreed to by the vendor. This amounted to an unauthorised variation of or an additional term to the SPA and this contravened cl 5.1 of the SPA. The parties had contemplated the execution of a supplemental agreement but this had G not been entered into despite exchange of drafts between their solicitors;

(b) the balance of the purchase price was not paid on 20 August 2008 to complete the sale and purchase and in any event the vendor's solicitors were instructed by the purchaser's solicitors not to bank in the three bank cashier cheques ('cashiers orders') forwarded to them by the H purchaser's solicitors on 20 August 2008;

(c) the purchaser had demanded the return of the three cashiers orders forwarded to the vendor's solicitors on 20 August 2008, and this clearly evinced an intention on the part of the purchaser to put the mutual I obligations under the SPA at an end;

(d) the purchaser had failed to establish on evidence that they were willing and ready to complete the sale and purchase as contracted for and accordingly the purchaser was in breach of the terms and conditions of the SPA; and

(e) in the light of the failure of the purchaser to complete the purchase in compliance with the terms of the SPA, the purchaser did not have any right or interest to lodge the caveat and the purchaser's refusal to remove the caveat despite notice given thereto, had resulted in loss and damage to the vendor which had to be compensated.

THE APPEAL

[11] The thrust of the appeal before us may be categorised under two major heads. They were:

(a) that there was a lack of adequate judicial appreciation or evaluation of the evidence by the learned trial judge, in particular, it was argued, that the oral evidence of the vendor's witnesses was not sufficiently tested against the contents of available contemporaneous documents; the court ought to have in any case made a finding as to credibility of those witnesses (which it did not) as their oral testimony contradicted the contents of those documents; and

(b) that the learned trial judge had failed to consider the terms of the SPA in its entirety, specifically that, pursuant to cl 4.2 of the SPA the purchaser was entitled in any event to an automatic extension of three months (in addition to the completion period) to complete the sale and purchase by payment of the balance of purchase price.

[12] Under the first category, it was argued by the purchaser that:

(a) upon a proper reading of all relevant contemporaneous emails and letters exchanged, there was no unilateral variation of the SPA or any imposition of any new or additional term by the purchaser;

(b) the purchaser had no obligation to pay the balance of purchase price on 20 August 2008 as it had been waived by the vendor itself who had insisted on a settlement agreement being entered into;

(c) by conduct, the vendor had treated the SPA as still subsisting even after 20 August 2008;

(d) there was clear evidence that the purchaser had at all material times intended to and was capable of completing the sale and purchase agreement; and

(e) it was the vendor who was not in a position or who had chosen not, to complete the sale and purchase namely, after the purchaser's solicitors' letter of 8 September 2008, which, inter alia, demanded specific performance of the SPA.

[13] It was further submitted that the termination notice issued by the purchaser's solicitors on 13 October 2008 was bad in law for the reasons contended in the previous paragraphs of this grounds and, more significantly, since the vendor has disregarded the purchaser's entitlement of an automatic three months extension to pay the balance of purchase price to complete the sale and purchase transaction.

[14] The vendor on the other hand submitted that the findings and orders of the learned trial judge were sustainable on the facts and on the law. It was urged upon us that there was no appealable error and the appeal court should be slow to interfere where the learned trial judge had combed through the SPA and all contemporaneous documents as well as having heard oral testimony in clarification or amplification of the same. It was submitted that the terms of the SPA had to be interpreted 'within the four corners of the SPA' and this was what had been done by the learned trial judge.

OUR DELIBERATION AND DECISION

[15] In our view, the opposing contentions of the parties can be better evaluated if the key developments and events related to the SPA were considered under three distinct periods, namely:

(a) pre-20 August 2008, the agreed completion date;

(b) events as they unfolded on 20 August 2008; and

(c) the conduct of the parties subsequent to 20 August 2008 and up to the 'termination' of the SPA by the vendor.

Pre-20 August 2008

[16] It was not in dispute that the SPA became unconditional on 21 May 2008 (see items 8–9 of agreed facts). The three months 'completion period' was to commence as of that date. This was confirmed by the purchaser's solicitors' letter of 22 May 2008.

[17] The representatives of the parties met on 29 July 2008 to discuss matters related to the completion of the SPA. At this meeting, the vendor proposed that both parties sign a supplemental agreement ('SA') and a power of attorney ('PA'), the latter with respect to the assignment of the leases (also the subject of the SPA). Solicitors for the purchaser by their letter of 4 August 2008 confirmed the discussions at that meeting and that they would prepare the draft of the SA/PA. Together with this letter a checklist in respect of the completion of the SPA (completion checklist) was forwarded by the purchaser's solicitors to the vendor's solicitors.

[18] On 11 August 2008, Ms Mak (PW2) of the purchaser's solicitors, forwarded a draft of the SA/PA by way of email to Ms Low of the vendor's solicitors for their feedback and for confirmation of the various sums due in order to facilitate payments to be readied accordingly, that is, in anticipation of the completion to take place on 20 August 2008.

[19] On 15 August 2008, Ms Low/vendor's solicitors forwarded their comments on the draft SA/PA which was expressed to be still ' ... subject to our client's approval'.

On 16 August 2008 (a Saturday) there was a further email at 1.52pm from Ms Low/vendor's solicitors highlighting that the sale and purchase was intended to be deemed as concluded and the SPA superceded by the execution of the SA. It was also stated there that the PA (mentioned to have been requested by the purchaser to facilitate the obtaining of consent from DBKL to the novation/assignment of the leases to Parcel A and Parcel B) was to be exclusively for the purchaser and limited to five years only. This latter letter concluded with the statement: 'Would appreciate if the above could be incorporated to reflect the true intention accordingly. O*ur client still reserves its right to comment further*'. (Emphasis added.)

[20] On 18 August 2008 at 6.03pm Ms Low/vendor's solicitors emailed Ms Mak/purchaser's solicitors and the email was as follows:

> Dear Ms Mak
>
> Further to our e-mail to you on 16 August 2008, our client insist that the settlement agreement for Parcel A and Parcel B has to be signed before completion of sale and purchase agreement and legal possession can take place. We foresee that your target completion date on 20 August cannot materialise and payment of the balance purchase price on 20 August 2008 is not deemed completion of the sale and purchase agreement.

[21] It is pertinent to note that Ms Mak replied that email within the hour (at 6.37pm on 18 August 2008) and the material parts of the email read as follows:

> 1. Attached is:
>
> 1.1 Our computation of the outgoings and DBKL rental on the basis that the Purchaser starts to pay w.e.f. 21 Aug 2008. Ps revert urgently if you do not agree with the computation.
>
> 1.2 The revised SA and PA.
>
> ...
>
> 3. With regards to the events taking place on 20 Aug 2008, we have mentioned to you before that we elect for Completion to take place at your office since your client does not want the land office. In this respect, we wish to arrive at your office at about

> 9.15 am so that there is sufficient time for us review the documents to be handed over to the Purchaser before we furnish you with the 3 bank drafts at 10.00 am. Our client's Ms Constance Ong will also be present as she will accept delivery of the documents to be handed over once we have reviewed them.
>
> ...
>
> 5. With regards to your e-mail of today, kindly note that we received your commented SA and PA on 16 Aug 08 at about 10:30 am and after lunch. We and our client have worked over the weekend and today to reply to you with our comments on the SA and PA; this being the case, we would appreciate that you and your client review our commented SA and PA urgently with a view to completing on 20 Aug 08.
>
> Our client's objective is similar to your client's objective – they too want to sign the SA and PA on or before 20 Aug 08. This is precisely the reason why we asked for the signing of the SA to be by way of counterpart. We will show to you our client's signing page on 20 Aug 08 and staple it together with your client's signing page on 20 Aug 08 to form the SA.
>
> 6. We wish to reiterate that our client is firm on completing the SPA and handing over the 3 bank drafts to you on 20 Aug 08.

[22] On 19 August 2008 at 11.15am, Ms Mak/purchaser's solicitors by way of email requested for the following:

(a) original and certified true copy of the vendor's directors' resolution;

(b) certified true copy of current quit rent and assessment receipts;

(c) documents as per the completion checklist which included the originals of the tenancy agreements, the building plans, the development order and the certificate of fitness for occupation; and

(d) the vendor's computation of the apportioned rental and deposits to be handed over to the purchaser on 20 August 2008.

[23] Thus far there was no doubt, in our assessment, that the purchaser's solicitors had made it clear that the purchaser was ready and willing to complete the sale and purchase agreement on the 20 August 2008 and had taken all steps towards that end. From the contents of Ms Low/vendor's solicitors' email of 18 August 2008, it was equally clear to us, that it was the vendor who was taking the position that the sale and purchase could not be completed on 20 August 2008 and had even gone on to put a rider or to preempt any payment of the balance purchase price, even if effected on 20 August 2008, to be not in completion of the sale and purchase by the purchaser.

Developments on 20 August 2008

[24] Now for the events of 20 August 2008. At 2.42am on 20 August 2008 Ms Low/vendor's solicitors by way of email notified Ms Mak/purchaser's solicitors that the terms of the revised SA and PA was not agreeable to the vendor. This was followed by another email from Ms Low/vendor's solicitors at 9.05am, the entire contents of which was as follows:

> Our client is of the opinion that its views with regard to the settlement agreement and power of attorney are ignored when you introduced new terms which were not discussed in the meeting on 29–07–08. Our client had all along insisted that they cannot give you the powers as you have indicated in your drafts above. This was something that was not provided for in the SPA and it is a new term AND furthermore it was your client who has chosen to exercise the waiver of conditions precedent to complete the SPA and thus it is not a variation of the SPA. Therefore, a supplemental agreement cannot be executed now after the SPA is deemed completed. *Completion will be subject to the settlement agreement being reached.*
>
> *We have no instructions to accept payment at this point in time.*
>
> *We will now draft the settlement agreement and the PA.* (Emphasis added.)

[25] Nevertheless, Ms Mak of the purchaser's solicitors personally attended at the vendor's office at 1.35pm and, under cover of a letter, handed over to the vendor's solicitors the three cashiers orders (all dated 19 August 2008), one of which was for RM64,945,800 being the balance of purchase price (90%). It was expressly stated in this letter that the cheques were being forwarded to the vendor's solicitors upon:

> (1) ... Your *strict undertaking* not to bank-in/hand over to the Vendor until the further agreement between the parties and the power of attorney are executed not later than 25 August 2008 or such other date as may be decided by the Purchaser; *otherwise we are entitled to request for a return of the said cheques;* and
>
> (2) there is no late payment interest accruing on the Balance of Purchase Price commencing from 20 August 2008. (Emphasis added.)

[26] It is material in this saga to note that this letter from the purchaser's solicitors of 20 August 2008 together with the three cashiers orders enclosed therewith, were accepted by Ms Low/vendor's solicitors and in the handwritten acknowledgment made on the letter itself, Ms Low/vendor's solicitors recorded the following statement:

> *Received on 20/08/08 at 1.35pm subject to execution of settlement agreement latest by 25/08/08, failing which late interest shall be charged.* (Emphasis added.)

[27] What needs to be emphasised at this stage was that firstly, at this point of time the vendor's solicitors had undertaken to draft the SA and PA (see their

email of same date of 9.05am). Secondly and more importantly, the cashiers orders tendered were not rejected or returned by Ms Low/vendor's solicitors. Another point to be noted (of implication in the next period of the episode) was that the purchaser's solicitors had in their letter forwarding the cheques reserved their right to request for a return of the cheques if the SA and PA were not executed by 25 August 2008 ' ... or such other date as may be decided by the purchaser. ... '.

[28] In our reading of the *alasan penghakiman*, the learned trial judge considered the imposition of the 'undertaking' in the purchaser's solicitors' letter of 20 August 2008 (which Her Ladyship said prevented or prohibited the encashing of the cashiers orders on that date) as being unilaterally done and amounted to adding of new terms and conditions to the strict requirements of the SPA. It was on this count that the learned trial judge held that there was a breach of the SPA by the purchaser.

Her Ladyship's conclusion is recorded as follows:

> Berdasarkan perkara-perkara di atas, saya dapati bahawa hujahan plaintif bahawa terdapatnya variasi pada terma-terma dan syarat-syarat PJB dan defendan diestop untuk menafikannya adalah tidak bermerit. Plaintif telah melanggar terma-terma dan syarat-syarat PJB. Plaintif secara unilateral mengenakan akujanji sebagai syarat atau terma baru ke atas defendan maka dengan itu saya dapati bahawa tidak ada variasi pada PJB. Plaintif dengan itu telah ketepikan tanggungjawab atau obligasinya untuk membayar baki harga belian.

[29] With respect, we are of the view that the learned trial judge took a rather simplistic approach and was in error in just accepting the oral testimony of the vendor's witnesses (including Ms Low) without critically testing it against the contents of contemporaneous and relevant documents. The sequence of correspondence/emails passing between the solicitors for the respective parties on this critical day and their contents, if analysed and appreciated properly, paint a different and contrary picture to the findings reached by the learned trial judge. We further do not see anywhere in the *alasan penghakiman* any analysis by the learned trial judge of the purport or effect of the vendor's solicitors handwritten note on the purchaser's solicitors' letter of 20 August 2008. The authenticity of this note was never in dispute.

[30] In our considered view, the undertaking imposed in the purchaser's solicitors' letter was expressly agreed to by the vendor's solicitors when there was no qualification expressed thereto in the handwritten note and when the cashiers orders tendered were not rejected outright. The only reservation expressed by the vendor's solicitors was that 'late interest' would be chargeable if the SA and PA were not signed by 25 August 2008. It must be reiterated that at this stage the vendor's solicitors had voluntarily taken upon themselves the responsibility of finalising the SA and PA.

[31] It was our view that to that extent, there was a written variation to the SPA mutually agreed to by the parties. The learned trial judge was clearly wrong in concluding that there was a 'unilateral' imposition by the purchaser of 'new terms and conditions' to the SPA by the events that transpired on 20 August 2008.

[32] The purchaser had tendered the full balance of purchase price towards the completion of the sale and purchase on 20 August 2008 within the terms of the SPA and therefore there was no evidential basis for the learned trial judge's further conclusion that the purchase had no intention to complete the sale and purchase transaction and/or failed to pay the balance of purchase price. An objective judicial assessment of the situation on that date would have disclosed that parties had mutually agreed that the balance of purchase price would only be banked in after the SA and PA was signed, the latest as it stood then, by 25 August 2008 (failing which, it must also be noted, the vendor had agreed that only late payment interest would be charged from the said 25 August 2008).

Developments between 20 August 2008 and 13 October 2008

[33] Nothing transpired between 20 August 2008 and 23 August 2008. On 23 August 2008 Ms Low/vendor's solicitors emailed to Ms Mak/purchaser's solicitors a draft of the SA for perusal and comments. This email went on to state 'Our clients reserves its rights to comment further on the draft settlement', which had to mean that the draft of the SA forwarded was still open to amendments by the vendor.

[34] By a letter of the 24 August 2008 the vendor's solicitors, informed the purchaser's solicitors, that the vendor had not agreed to grant a PA in respect of the leases to the purchaser and further in justifying this refusal (now, at this stage to grant the PA) went on to state as follows:

> 8. *Now that the SPA is completed with the payment of the purchase consideration*, our client becomes the bare trustee for the leases. In law, a bare trustee has no active duties to perform in this case the waiver has made the SPA unconditional and all terms and conditions therein have been fulfilled. In law, the bare trustee cannot give a power of attorney when it has no more legal rights to give. Furthermore, our client cannot create a trust under the Lease Agreement as it will be a breach of the Lease Agreement.
>
> ...
>
> ...
>
> 11. In view of the above, our client is not able to give your client a power of attorney. (Emphasis added.)

[35] In a follow-up letter of 25 August 2008, the vendor's solicitors further

stated:

> On our client's instruction, we hereby remind that interest will be chargeable at the rate of 8% from tomorrow until the execution of the Settlement Agreement.

Surely, the vendor's position as per their solicitors' letters of 24 August 2008 and 25 August 2008, was that the sale and purchase has been completed and what remained outstanding was late payment to be calculated from 26 August 2008 until execution of the SA.

[36] By a letter of 27 August 2008 the purchaser's solicitors recited the events that had taken place on 20 August 2008 and also subsequent to that date, and highlighted the fact that the vendor had not delivered up to the 27 August 2008, the relevant documents that had to be made available to complete the transaction as demanded by the purchaser's letter of 4 August 2008 and followed up with reminders thereafter. In this regard, it was stated by the purchaser's solicitors as follows:

> 7. Notwithstanding the above, your client until today has not delivered the following documents as per your client's obligations under the SPA, and as requested by us in writing since 4 August 2008, despite numerous reminders to do so ('Non-Compliance') in particular, the aforementioned documents were not made available for delivery to us or for our sighting, on 20 August 2008 when the Cheques were delivered to your office:
>
> ...
>
> ...
>
> ...
>
> In view of the above Non-Compliance and your client's refusal to finalize and execute the settlement agreement (with PA therein), our client's obligation to pay the Balance Purchase Price is not due and your client's claim that interest at the rate of 8% per annum on the Balance Purchase Price with effect from 26 August 2008, as demanded in your letter dated 25 August 2008, is baseless. At all material times, our client is ready and able to complete the SPA; therefore, our client shall not be held responsible for any delay not caused by them and for any interest payment arising therefrom.

The purchaser's solicitors demanded that the vendor rectify the 'non-compliance' and in the meanwhile return the three cashiers orders by 28 August 2008 and this was stated expressly as follows:

> 8. ...
>
> ...
>
> (b) that your client rectifies the Non-Compliance and perform all undertakings in connection with the completion of the SPA, before our client is obliged to pay the Balance Purchase Price.

and at:

11. Kindly expedite and inform us of your proposed Completion Date so that the parties can work towards achieving it.

[37] The purchaser's solicitors in a follow-up letter of 29 August 2008 wrote as follows:

Whilst your client takes time to rectify the Non-compliance as stated in our letter dated 27 August 2008 and perform all undertakings towards completion of the SPA, kindly return all the cheques so that our client will not continue to suffer loss of interest on the Cheques due to no fault of theirs and your client is not liable to our client for interest at the rate of 8% per annum calculated on a daily basis from 28 August until the date of actual return.

Once your client has performed its undertakings and is ready to complete, our client will make payment of the Balance Purchase Price, the Stakeholder Sum and the apportioned outgoings. As such, please advise us when this date will be. (Emphasis added.)

[38] This position of the purchaser was once again restated in a reminder letter of 4 September 2008 from the purchaser's solicitors to vendor's solicitors and the concluding paragraph of that letter read:

We are instructed to inform that fresh banker cheques for the Balance Purchase Price, the Stakeholder Sum and the truly apportioned outgoings will be furnished as and when your client informs us in writing that they are ready to complete the sale of the Properties.

[39] The vendor's solicitors by a letter of 3 September 2008 (which was only received by the purchaser's solicitors by facsimile on 4 September 2008 and by hand on 5 September 2008) raised for the first time the issue that the purchaser had imposed new terms and conditions to the SPA and further denied that the vendor's solicitors had agreed to the 'undertaking' set out in the letter of 20 August 2008 from the purchaser's solicitors.

Interestingly however, in terms somewhat contradictory to their stand on the matter, the vendor's solicitors went on to further state as follows too:

8. In view of you and/or your client's repeatedly imposing new terms and conditions not in accordance with the SPA, *your firm and/or your client is liable for interest accruing at the rate of 8%* per annum on a daily basis on the sum of RM65,500,096.73 (amounting to RM14,356.18 per day) *from 21 August 2008 until the balance purchase price is paid in accordance with clause 5.1(b) of the SPA.* (Emphasis added.)

[40] By a letter of 8 September 2008 the purchaser's solicitors contested the matters raised by the vendor's solicitors in their letter of 3 September 2008 reciting what had indeed transpired as between them to that date after the

meeting on 29 July 2008. This letter also denied that the purchaser had any intention to repudiate the SPA. At para 18.3 it was stated in no uncertain terms as follows:

> 18.3 ...
>
> (a) In respect of our client's aforementioned demand for specific performance of the SPA, the Completion shall take place *on or before 15 September 2008. On Completion, you are entitled to deal with the Banker's Cheque of RM64,945,800.00 in accordance with the SPA. Our client is able and ready to complete the SPA within 24 hours from the date of our receipt of written notice from your client or you:*
>
> (b) Our client will re-compute all outgoings in view of the Completion being delayed to 15 September 2008 by reason of the bilateral negotiations and furnish your client with a fresh banker's cheque for the duly apportioned outgoings on the Completion Date; and
>
> (c) ...
>
> (Emphasis added.)

It needs to be stated that the three cashiers orders were still in the hands of the vendor's solicitors and they were informed to retain the one cheque for the balance of purchase price and deal with it upon the anticipated completion on 15 September 2008. It is also noteworthy that in this letter the purchaser's solicitors registered the fact that stamp duty payable on the transfer amounting to RM2,158,860 had been effected by the purchaser on 14 August 2008 (see para 13 thereof).

[41] The vendor's solicitors ignored the above letter from the purchaser's solicitors of 8 September 2008 and by making reference to only the purchaser's solicitors' letter of 20 August 2008 and 4 September 2008, on 12 September 2008 returned the cashiers orders to the purchaser's solicitors. It is germane to also note how this return of the cashiers orders was couched by the vendor's solicitors, namely, that at that point of time, the transaction could not be completed, not that the purchaser had breached the SPA:

> 7. Lastly, as the completion date of the SPA *cannot be completed at this point of time*, we return herewith the cheques, particularly of which are:
>
> ...
>
> ...
>
> ...
>
> (Emphasis added.)

[42] Despite the vendor holding out on 24 August 2008 and 25 August 2008 being that the ' ... SPA is completed ... ' and that the only remaining issue was as to the interest that would be chargeable from 26 August 2008, the

vendor's stand appeared to take a diametrically different position on 3 September 2008, now denying the 'undertaking' and the vendor's acknowledgment contained in the letter of 20 August 2008 and further alleging that the purchaser had imposed new terms and conditions in respect of the sale and purchase transaction. In the vendor's solicitors' further letter of 12 September 2008, as pointed out above it was stated that: ' … the SPA cannot be completed at this point of time … ', reasonably bearing meaning or representation that the transaction was still open as between the parties.

[43] These incongruous and equivocal stances of the vendor during this critical period of time should have been obvious to the learned trial judge if proper attention and analysis were accorded to the correspondence passing between the solicitors for both the parties. The attempt by the witnesses called by the vendor to contradict those express words in contemporaneous documents by way of oral testimony before the court should have been treated with circumspect, if not rejected outright, as self-serving and an attempt to salvage what was otherwise an untenable position asserted by the vendor based on the train of factual events and developments in the matter.

[44] The suit for specific performance was filed on 6 October 2008 by the purchaser, as earlier stated, after a notice was issued by the purchaser's solicitors on 17 September 2008. The vendor through their litigation solicitors then on 13 October 2008 issued their notice of termination of the SPA.

[45] Another vital point that was not adequately addressed or evaluated by the learned trial judge was that it was an express term of the SPA that in any event the purchaser was entitled to an automatic extension of time of a further three months (calculated from the completion date) to pay the balance of purchase price. The material part of cl 4.2 (see para 7 above) was as follows:

> … In the event the Balance Purchase Price is not paid or cause to be paid by the Purchaser by the expiry of the Completion Period, *the Purchaser is entitled to an automatic extension of three (3) months from the expiry of the Completion Period or* such other extended period as may be mutually agreed by parties in writing (the 'Extended Completion Period') to allow the Purchaser to pay the same subject to the Purchaser paying to the Vendor interest on the Balance Purchase Price … (Emphasis added.)

It was the purchaser's contention that the three month automatic extension calculated from the agreed completion period/date of 20 August 2008 would have expired only on 19 November 2008 and the notice of termination issued by or for the vendor was in that circumstance premature and unsustainable by the terms of the SPA in any event.

[46] That there was such a right to an automatic extension of time granted to the purchaser as per the terms of the SPA was not in dispute. Before us,

however counsel for the vendor argued that the purchaser was nevertheless *not entitled* to avail itself of that extension as the purchaser had firmed up the completion date to be 20 August 2008 (as evidenced in the correspondence) and was bound to that date having, as it was contended, waived the right to such an extension. It was contended further in this respect that as no payment of the balance of purchase price had been *effectively* made on that date, the SPA had been breached by the purchaser.

[47] In our view, the submission of counsel for the vendor that the purchaser was disentitled to an extension was wholly devoid of any merit. We need only refer to the discussion above in this grounds as to the sequence of events that had actually transpired on 20 August 2008 and subsequently, and most significantly the vendor's solicitors own written assertion and confirmation made on 24 August 2008 that ' ... that the SPA is completed ... '. The purchaser's reliance on this 'automatic extension' entitlement was to point out that, putting aside the controversy surrounding the question whether the payment of the balance of purchase price have been effectively made or not, the purchaser had still time to make payment in any event, which had been pre-empted by the wrongful notice of termination of SPA issued by the vendor's solicitors on 13 October 2008.

CONCLUSION

[48] In our assessment this was a case where appellate intervention was warranted in all the circumstances of the matter as discussed and elaborated above, to prevent an injustice being occasioned to the purchaser. The learned trial judge's crucial so called finding that the purchaser was not willing and able to complete the sale and purchase and/or had evinced an intention not be further bound to the terms of the SPA was wholly perverse when evidence all pointed otherwise. It was clearly evident that the learned trial judge's focus of enquiry was wholly misplaced and the acceptance of the oral testimony of the vendor's witnesses without critically testing it against available contemporaneous documents, had in this case resulted in a failure of proper judicial appreciation of the totality of evidence, both oral and documentary, led before the court.

[49] In *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; [1979] 1 LNS 119, Chang Min Tat FJ said:

> ... the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. *For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of*

it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. (Emphasis added.)

[50] Siti Norma Yaakob JCA (as she then was) in *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yaakob & Ors* [2000] 4 MLJ 433, in similar vein, observed as follows:

In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it also incumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact ... He should after accepting the respondent's evidence, weigh it against the contemporaneous documents and evaluate whether such documents support the respondent's oral testimony.

[51] The Court of Appeal in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 per Gopal Sri Ram JCA (as he then was), instructively stated:

A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. *Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case.* A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case; the approach to judicial appreciation of evidence is the same. There are a number or important and leading cases in which the point has been considered. (Emphasis added.)

[52] The Federal Court in endorsing the Court of Appeal in *Lee Ing Chin @ Lee Teck Seng* in the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, commented further on inadequate judicial appreciation of evidence by a trial judge and its susceptibility to intervention by the appellate court in the following words:

In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. *In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court.* Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This

A is reflected on the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision in an issue of fact be assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. (Emphasis added.)

B

[53] We were of the unanimous view that the findings and orders of the High Court were in this case unsustainable, in that, the learned trial judge had failed to adequately assess and weigh all the evidence led before the court as enumerated above. Reversal of orders made by a trial court, even on 'findings of fact' was justified in such circumstances based on established and time honoured principles on the permissible scope of appellate intervention. We accordingly allowed the appeal of the purchaser (appellant).

C

D

Appeal allowed.

Reported by Afiq Mohamad Noor

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